UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

GERARD BOECKMAN, et al.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 05-658-GPM
	)	
A.G. EDWARDS, INC.,	)	
	)	Class Action
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction

Defendant A.G. Edwards, Inc. ("Defendant") argues that all four counts of the Complaint are barred by a release signed by Gerard Boeckman ("Plaintiff") upon his termination of employment, and that the two counts alleged under ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), fail for the additional reason that a mutual fund is not a "party in interest" within the meaning of ERISA solely by virtue of a plan's investment in such funds. The Court should deny Defendant's motion for the following reasons.

First, the release does not extend to claims accruing after the date it was executed, and it would be void under ERISA § 410(a), 29 U.S.C. § 1110(a) if it attempted to. Claims arising after the release's effective date are specifically excluded from operation of the release by its own language. The claims asserted in the Complaint are based on violations that accrued after the release was signed and continue to occur to date because Plaintiff is still a participant in the Plan. Therefore, the release is either inapplicable and/or void as to them. **Second,** Plaintiff's

Complaint does not allege claims on behalf of the Plaintiff individually, but rather derivative claims on behalf of the A.G. Edwards, Inc. Retirement and Profit Sharing Plan ("the Plan") as a whole. An individual participant cannot waive the claims of the Plan without the Plan's consent. **Third**, the release specifically excludes claims "with respect to" vested employee benefits, which include the type of claims asserted here. **Finally**, ERISA § 3(21)(B), 29 U.S.C. § 1002(21)(B), is inapplicable, because Plaintiff does not allege that the mutual funds are "parties in interest" solely because the Plan invested funds with them.

II. Background

A. Mutual Fund Facts.[1]

A mutual fund is a company that pools the money of investors (its shareholders) and invests that money into diversified securities selected to achieve the specific investment goals of the fund. Smaller investors cannot afford the services of a professional portfolio manager, and mutual funds allow such investors to benefit from professional portfolio management as well as to diversify their investments.

Mutual funds enter into agreements with sponsor companies to provide investment advisory, promotional and administrative services for the funds' shareholders in exchange for various fees. These fees include shareholder service fees, transfer agent fees, 12b-1 fees, administrative fees, registration and reporting fees, reports to shareholder expenses, postage and stationary fees, audit and legal fees, custodian fees, and state and local taxes. *See* Compl., ¶12.

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[1] *See, e.g.,* Albert J. and Russ Wiles. How Mutual Funds Work. 2nd edition. New York; Toronto: New York Institute of Finance, 1998. In offering these facts, Plaintiff is not attempting to convert Defendant's motion for judgment on the pleadings to one for summary judgment. These general facts are offered for the purpose of providing the Court with a context for understanding the nature of Plaintiff's Complaint.

The fees paid to the sponsor companies for services provided to the mutual fund are passed through to shareholders.

In the mid-1980's, mutual funds began the practice of establishing and issuing different share classes. These share classes are typically categorized as "retail" (those shares being sold to small and individual investors) and "institutional" (those shares being sold to large or institutional shareholders such as endowments and private retirement plans). In general, the institutional classes are stripped of excessive fees, expenses and loads, because the institutional market is well-informed, sophisticated and has bargaining power due to the amount of money available to invest with the funds. Institutional class eligibility usually requires a relatively high minimum initial investment. In contrast, retail shares are offered to the public, do not require large initial investments, and have much higher management expenses. For example, the retail shares of one of the funds available in the Plan, the American Funds Growth Fund of America, have an expense ratio of 70 basis points (or.7%), while the institutional shares for the same fund have an expense ratio of only 41 basis points (or .41%). *See* Compl., ¶15. There is little, if any, difference in the investment services provided by the sponsor companies to institutional investors versus retail investors.

B. Facts of this Case.

Defendant sponsors and maintains the Plan (a 401(k) plan) for the benefit of its employees. *See* Compl., ¶1; Ans., ¶1. The Plan allows participants to contribute a percentage of their pre-tax earnings to the Plan. *See* Compl., ¶7; Ans., ¶7. The Plan further allows participants to invest their contributions in one or more of a list of 38 mutual funds available in the Plan. *See* Compl, ¶9; Ans., ¶9. All of the mutual fund investment options offered to Plan participants are

retail shares. *See* Compl., ¶14. Although all but four of the mutual funds available in the Plan sell institutional shares to large investors, Defendant does not purchase institutional shares of these funds for the Plan. *See* Compl., ¶14.

Plaintiff, a former employee of Defendant, began participating in the Plan in 1997. *See* Def's Ans., ¶1. When Plaintiff's employment was terminated, Defendant offered Plaintiff a severance package. As a condition of accepting the severance package, Plaintiff was required to sign a release. In relevant part, the release states:

> Release. You agree to accept the compensation, payments, benefits and other consideration provided for in paragraph 3 above in full resolution and satisfaction of, and hereby IRREVOCABLY AND UNCONDITIONALLY REMISE, RELEASE, WAIVE AND FOREVER DISCHARGE the Company and Releasees from, any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, rights, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which you have ever had, now have or in the future may have against the Company and Releasees including, but not limited to, claims arising out of or relating to your employment with the Company, the termination of your employment with the Company, compensation and/or benefits with the Company. You further understand and agree that this Agreement and Release shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by you and which seeks personal, equitable or monetary relief for you against the Company and Releasees... **except for... claims with respect to any benefits in which you have a vested interest under the terms and conditions of any of the Company's employee benefit plans.** You hereby waive and relinquish any and all rights you may have under any federal, state or local statutes, rules, regulations or principles of common law or equity which may in any way limit the effect of this release and other terms of this paragraph 6(a) which you did not know or suspect to exist in your favor at the time you executed this Agreement and Release, provided that **it is understood and agreed that you are not waiving your ability to sue on any claim which may arise in the future from events or actions occurring after the date of this Agreement and Release.**

See Exhibit A to Ans. – Agreement and Release, ¶6(a) (emphasis added).[2]

Plaintiff signed the release on March 14, 2002. *See* Exhibit A to Ans. – Agreement and Release, p. 9. Although he left Defendant's employment, Plaintiff continues to be a participant in the Plan because he left his money in the Plan. *See* Compl., ¶1, Ans., ¶1.

Plaintiff filed his Complaint on September 15, 2005. Plaintiff's Complaint alleges that Defendant violated ERISA by offering only retail shares of mutual funds in its 401(k) plan, when, because of the amount of assets held in the Plan, Defendant could have privately negotiated a lower fee with the same professional money manager used by the mutual funds and/or could have purchased less expensive institutional mutual fund shares. Counts I and II allege a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109. More specifically, Count I alleges that Defendant breached its fiduciary duty to the Plan by failing to negotiate fees directly with a money manager. Count II alternatively alleges that Defendant breached its fiduciary duty to the Plan by purchasing retail shares instead of institutional shares. Counts III and IV allege causes of action under ERISA § 406(a)(1)(D), which prohibits plan fiduciaries, like Defendant, from engaging in certain transactions with "parties in interest." More specifically, Count III alleges that Defendant improperly transferred plan assets to a party in interest (the mutual funds) in the amount of the difference between the fees actually charged by the mutual funds to shareholders holding retail shares and the fee that shareholders would have paid had Defendant privately negotiated a contract with the money manager. Alternatively, Count IV alleges that Defendant improperly transferred plan assets to a party in interest (the mutual funds)

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[2] Defendant quotes selectively from the operative paragraph of the release, notably omitting language that is not favorable to its position.

in the amount of the difference between the fees actually charged by the mutual funds to shareholders holding retail shares and the fees charged to those holding institutional shares.

III. Discussion

A. Legal Standards on Motion for Judgment on the Pleadings.

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) "may be granted only if the moving party clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law. The court may consider only matters presented in the pleadings and must view the facts in the light most favorable to the nonmoving party." National Fid. Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987) (internal citation omitted); Guise v. BWM Mortg., LLC, 377 F.3d 795, 798 (7th Cir. 2004). "The Court considers the complaint, answer and any written instruments attached to those pleadings, accepts all well-pleaded allegations in the complaint as true and draws all inferences in favor of the plaintiff." Hall v. Operative Plasterers' and Cement Masons' Intl. Ass'n Local Union 143, 188 F.Supp.2d 1013, 1016 (S.D. Ill. 2001) (Gilbert, J.). "Because a Rule 12(c) motion seeks to determine the merits of the controversy and reach judgment in the case, the court should be reluctant to grant the motion unless it is clear the merits of the claim can be fairly decided summarily." Abbott Laboratories v. NutraMax Prod., Inc., 844 F.Supp. 443, 445 (N.D. Ill. 1994) (Norgle, J.).

B. The Release Does Not Bar Plaintiff's Claims.

Defendant first argues that all four counts in Plaintiff's Complaint are barred by the March 14, 2002 release. According to Defendant, the release covers the claims alleged in Plaintiff's Complaint, Plaintiff knowingly and voluntarily signed the release, and Plaintiff ratified

the release by failing to return the consideration supporting the release prior to filing suit. Because the issue of whether the release bars Plaintiff's claims is an affirmative defense, Defendant bears the burden of proof by a preponderance of the evidence that the release is effective. Wisch v. Whirlpool Corp., 927 F.Supp. 1092, 1094 (N.D. Ill. 1996) (Denlow, J.); Auslander v. Helfand, 988 F.Supp. 576, 580 (D. Md. 1997) (Young, J.). Further, "the validity of waiver of pension benefits under ERISA is subject to closer scrutiny than a waiver of general contract claims." Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 231 (2nd Cir. 1995). For the reasons that follow, Defendant has failed to meet its burden of proving the release is effective in this case.

1. The Release Does Not Bar the Claims Asserted in Plaintiff's Complaint That Accrued after its Effective Date.

a. ERISA § 410 Voids Releases that Attempt to Bar Future Claims.

ERISA § 410, 29 U.S.C. § 1110, provides, "any agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." *See also* In re Egea, 236 B.R. 734, 746 (D. Kan. 1999) (Flannagan, J.) (a release that "purports to relieve an ERISA fiduciary from liability is void as against public policy"). Plaintiff's Complaint alleges that Defendant is an ERISA fiduciary (*see* Compl., ¶2), and this allegation must be taken as true for purposes of the instant motion. Hall, 188 F.Supp.2d at 1016. Thus, to the extent Defendant attempts to enforce the release in the context of this lawsuit, which seeks to hold Defendant to its fiduciary responsibilities under ERISA, the release is void under the clear language of ERISA § 410.

In spite of ERISA §410, Defendant argues that breach of fiduciary duty claims can be released based on Howell v. Motorola, Inc., 2005 WL 2420410 (N.D. Ill. 2005). However, the release at issue in Howell was in the nature of a settlement and accordingly relieved Defendants of liability *for past claims only*. Id. at *5.[3] Notably, the Howell Court observed that plaintiff's complaint failed to allege a breach of fiduciary duty occurring after the effective date of the release in that case. Id. at *7. Thus, Howell might be persuasive if Plaintiff's claims accrued prior to March 14, 2002, as Defendant argues. But they did not.

Plaintiff's Complaint alleges a violation that occurred after March 2002 and continues to this day. *See generally* Compl., which is consistently phrased in the present tense. *See also* Compl., ¶20, seeking to certify class of all persons who participated in the Plan "at any time within the applicable statute of limitations." Each time Defendant pays excessive fees to the mutual funds in connection with the retail shares held in the Plan, it has breached its fiduciary duty to Plan participants. Dole v. Formica, 1991 WL 317040, *7-8 (N.D. Ohio 1991)

[3] The other cases Defendant cites are even farther afield from the facts of this case. Both involve claims by plan participants that they were entitled to additional benefits *under the terms of the release itself*. *See* Fair v. Intl. Flavors & Fragrances, Inc., 905 F.2d 1114 (7th Cir. 1990) (release barred plaintiff's claim that under terms of release, lump sum settlement should have been included in "wages" for purposes of calculating pension benefits); Licciardi v. Kropp Forge Div. Employees' Ret. Plan, 990 F.2d 979 (7th Cir. 1993) (release barred plaintiff's claim that under terms of release, lump sum payment for past services should have been included in "earnings" for purposes of pension calculation). Fair and Licciardi would control if, for instance, Plaintiff here alleged in his Complaint that the amount of severance benefits he received in connection with the release should have been included for purposes of calculating his pension benefit. But that is **not** the type of claim Plaintiff asserts. Rather, Plaintiff alleges that Defendant breached its fiduciary duties to the Plan and/or engaged in prohibited transactions, i.e., a statutory violation rather than a claim based on the release itself. As such, the holdings of Fair and Licciardi are inapposite. *See* Lynn v. CSX Transp., Inc., 84 F.3d 970, 976 (7th Cir. 1996) (distinguishing Fair and Licciardi in case where claimant asserted claim under the terms of the plan document and not the settlement agreement).

(Batchelder, J.) (holding ERISA breach of fiduciary duty claim not barred by statute of limitations, because each time excessive fees were paid to third party, ERISA plan was harmed anew, and new cause of action accrued); NYSA-ILA Medical & Clinical Services Fund v. Catucci, 60 F.Supp.2d 194, 199-200 (S.D. N.Y. 1999) (Motley, J) (each improper payment of ERISA plan assets to third party was a distinct action that supported a new breach of fiduciary duty claim, so claims were not time barred).

Long after the release was signed on March 14, 2002, Defendant continued to purchase only retail shares on behalf of the Plan and in fact continues to do so to date. Accordingly, the Plan also continued to pay the higher expenses associated with such retail shares and in fact continues to do so to date. Each time these higher fees are paid, the Plan is harmed. Each time these higher fees are paid, Defendant has breached its fiduciary duties to Plan participants. Therefore, each time these higher fees are paid, a new cause of action accrues under ERISA § 409 and § 502(a)(2). Dole, NYSA-ILA, *supra*.

Case law is clear that a release that attempts to bar claims accruing *after* the date the release is signed is void as a matter of public policy under ERISA § 410. *E.g.*, Reighard v. Limbach Co., Inc., 158 F.Supp.2d 730, 732 (E.D. Va. 2001) (a release cannot prospectively waive future rights or claims under ERISA); Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1293 (10th Cir. 1991) (release insufficient to bar ERISA claim that was asserted in lawsuit filed after date of release). The reason for this rule is simple and compelling – waiver of future statutory rights "would have the pernicious effect of tending to encourage violations by assuring the wrongdoers that they may act with impunity." Reighard, 158 F.Supp. at 733; *see also* Cange v. Stotler and Co., Inc., 826 F.2d 581, 594-95 (7th Cir. 1987) (observing, in non-ERISA release

case, that attempts to prospectively waive the right to pursue remedies for statutory violations tend to encourage violation of law and are thus void as contrary to public policy).[4]

This rule should guide the Court's decision here. The Court should hold that pursuant to ERISA § 410, the release is void with respect to the claims asserted in Plaintiff's Complaint, which, because of their continuing nature, accrued *after* the effective date of the release.

b. The Release Itself Specifically Excludes Future Claims.

Moreover, as noted in Section II.B., above, the release itself states, "it is understood and agreed that you are not waiving your ability to sue on any claim which may arise in the future from events or actions occurring after the date of this Agreement and Release." *See* Exhibit A to Ans., ¶6(a). Thus, even if the release was not void as a matter of law under ERISA § 410, the claims alleged in Plaintiff's Complaint would not be barred by the release, because they fall under this clear exception for claims arising in the future from events occurring after the date of the release.

2. Beneficiaries Cannot Release the Plan's Claims as a Matter of Law.

The claims alleged in Plaintiff's Complaint are derivative in nature, i.e., Plaintiff sued on behalf of the Plan alleging that Defendant's conduct harmed the plan as a whole. More specifically, Plaintiff's Complaint alleges causes of action under ERISA §§ 409 and 502(a)(2).

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[4] Alternatively, the Court could hold that the Plaintiff did not knowingly and voluntarily waive his right to sue Defendant under ERISA. This is so because at the time Plaintiff signed the release, he could not have known that Defendant would continue to offer retail shares as the only investment option in the Plan. Wright, 925 F.2d at 1293 (release insufficient to waive future claims against the defendant about which neither party knew when the release was signed); *see also* Transportation Ins. Co. v. Spring-Del Assoc., 159 F.Supp.2d 836 (E.D. Pa. 2001) (Kelly, J.) (generally, release cannot bar a claim that was not within the contemplation of the parties at the time of signing, and a claim that had yet to accrue as of that time falls under this rule).

See Compl., ¶¶25, 30, 37 and 44. *By definition*, such claims inure to the benefit of the plan and do not allow for awards to individual plan beneficiaries. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). As such, Plaintiff has not and could not advance an individual claim under ERISA §§ 409 and 502(a)(2).

The release has no effect on the claims brought in this lawsuit on behalf of the Plan. The Plan did not sign the release and did not consent to Plaintiff releasing claims on its behalf. A participant cannot waive a plan's ERISA claims as a matter of law. In re Electronic Data Systems Corp. "ERISA" Litig., 224 F.R.D. 613, 624 (E.D. Tex. 2004); In re Williams Co. ERISA Litig., 231 F.R.D. 416, 423 (N.D. Okla. 2005); Bowles v. Reade, 198 F.3d 752, 759-60 (9^{th} Cir. 1999) (participant cannot settle or release plan's claim without plan's consent); Ricke v. Armco, Inc., 92 F.3d 720, 724-25 (8^{th} Cir. 1996) (noting in context of LMRA case that a beneficiary generally cannot release a trust's claims against a third party and that general trust principles apply to ERISA trusts). In short, by signing an individual release, Plaintiff could not waive the claims asserted in the Complaint, which by definition are derivative claims brought on behalf of the Plan under ERISA §§ 409 and 502(a)(2).

3. The Release Excludes the Type of Claims Asserted in Plaintiff's Complaint.

The release states that all claims are released "...except for... *claims with respect to any benefits in which you have a vested interest under the terms and conditions of any of the Company's employee benefit plans*." *See* Exhiballeged in Plaintiff's Complaint are clearly "claims with respect to benefits in which [Plaintiff] has a vested interest under the terms and conditions of any of [Defendant's] employee benefit plans." Defendant admits that the Plan is an "employee pension benefit plan" under ERISA. *See* Compl., ¶2, Ans., ¶2. Plaintiff would not

have the right to assert the ERISA claims alleged on behalf of the Plan in the Complaint were it not for his vested interest in plan benefits. Thus, the release explicitly carves out an exception for the claims Plaintiff asserts in this case.

Defendant acknowledges this fact, but makes a specious argument that the foregoing exclusion covers only claims "for benefits" and that Plaintiff does not assert a claim "for benefits" in this case. *See* Def.'s Memorandum of Law at p. 7, fn 4 (Doc. 12-1). The express wording of the release, however, excludes claims "with respect to" benefits, not just claims "for" benefits as Defendant argues. The Court should reject Defendant's attempt to rewrite the release and narrow the scope of the exception to claims "for benefits" only.

The meaning of the phrase "with respect to" was addressed in Knisley v. United States, 901 F.2d 793 (9th Cir. 1990). The issue in Knisley was whether the phrase "any transfer *with respect to* a life insurance policy" in 26 U.S.C. § 2035(b)(2) included transfer of funds for the payment of premiums due on the policy in addition to transfer of ownership of the policy itself. Id. at 796. In rejecting an argument that the statute should be read restrictively to include only transfers *of* a life insurance policy, the Court observed that it was not free to disregard Congress's more expansive qualifying language embodied in the phrase "with respect to." Id. The Court noted that had Congress wanted to limit the statute's application to transfers *of* a life insurance policy, it could have simply said so in the statute. Id.

Similarly, had Defendant here wished to exclude only claims "for benefits" from the scope of the release, it could have said so in the release. Instead, the release provides that any claims "with respect to" benefits are excluded from its coverage. "When an agreement is clear on its face, the plain language of the document controls and the contract must be enforced as

written." U.S. ex rel. Robinson v. Northrop Corp., 149 F.R.D. 142, 147 (N.D. Ill. 1993) (Moran, J.). "With respect to" means nothing more than that two items bear some relationship to each other. *See, e.g.*, Dillon Co., Inc. v. Royal Indem. Co., 369 F.Supp.2d 1277, 1286-87 (D. Kan. 2005) ("but only with respect to" means the conjoined matters "bear some relationship to each other"); Hartford Cas. Ins. Co. v. Travelers Indem. Co., 110 Cal.App.4th. 710, 719, 2 Cal.Rptr.3d 18, 25 (Cal. Ct. App. 2003) (noting various dictionary definitions of the phrase "with respect to" as merely indicating "some relationship" between the items in question). Because the breach of fiduciary duty and prohibited transaction claims asserted in Plaintiff's Complaint bear some relationship to Plaintiff's benefits under the Plan, they fall within the broad exception of Paragraph 6(a) and are not barred by the release.

4. Plaintiff Does Not Have to Return The Consideration He Received in Exchange for the Release in Order to Pursue this Lawsuit.

Defendant finally argues that in order to "rescind" the release, Plaintiff must first return any consideration he received in exchange for the release. Defendant's argument misses the mark. Plaintiff is not trying to "rescind" the release. Rather, Plaintiff simply observes that for any one of the three reasons discussed above, the release does not bar the claims asserted in Plaintiff's Complaint. In sum, the release 1) expressly excludes the type of claims asserted in the Complaint; 2) is void as a matter of law under ERISA § 410 to the extent it purports to bar future claims; and/or 3) has no effect on the derivative claims alleged in the Complaint on behalf the Plan, because it was signed by Plaintiff without the consent of the Plan. None of these arguments are an attempt by Plaintiff to rescind the release.[5]

[5] For this reason, Defendant's argument is not supported by Fleming v. United States Postal Service AMF O'Hare, 27 F.3d 259 (7th Cir. 1994). In Fleming, the plaintiff sought

C. Plaintiff Has Not Alleged That the Mutual Funds Are "Parties in Interest" Solely Because Plan Assets Are Invested in Their Securities.

Defendant contends that Counts III and IV (the prohibited transaction counts) are barred because the mutual funds to which plan assets were transferred are not "parties in interest" for purposes of ERISA § 406(a)(1)(D). Section 406(a)(1)(D) prohibits a plan fiduciary from causing the plan to engage in a transaction that will result in plan assets being transferred to or used by or for the benefit of "a party in interest." ERISA defines a "party in interest" as "any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of [an] employee benefit plan" or "a person providing services to such plan." ERISA § 3(14)(A)-(B), 29 U.S.C. § 1002(14)(A)-(B).

There can be no doubt that the mutual funds provide services to the Plan. This is why the mutual funds accrue and deduct shareholder service fees, transfer agent fees, 12b-1 fees, administrative fees, registration and reporting fees, reports to shareholder expenses, postage and stationary fees, audit and legal fees and custodian fees from their share values. *See* Compl., ¶12. Defendant argues that the mutual funds are excluded from the definition of "parties in interest" by ERISA § 3(21)(B). ERISA § 3(21)(B) provides that if any assets of an employee benefit plan are "invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not *by itself* cause such investment company to be deemed to be a fiduciary or a party in interest" (emphasis added). The Department of Labor has issued an interpretive regulation clarifying that "if an investment company, its investment adviser or its principal underwriter is a fiduciary or party in interest *for a reason other than the*

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to have a settlement agreement completely *set aside*.

investment in the securities of the investment company, such a person remains a fiduciary or party in interest." 29 C.F.R. § 2509.75-3 (emphasis added).[6]

Plaintiff's Complaint does not allege that the Plan's investment in the mutual funds *by itself* caused the mutual funds to become parties in interest. Plaintiff simply alleges in a conclusory fashion that the mutual funds were "parties in interest" without further explanation. *See* Compl. ¶33, 40. Thus, there is nothing in Plaintiff's Complaint asserting that the mutual funds are parties in interest solely because of the investment of plan assets as would be required for the Court to grant a motion for judgment on the pleadings.

Whether the mutual funds are parties in interest for purposes of ERISA is a mixed question of fact and law. *See* District 65 Ret. Trust for Members of Bureau of Wholesale Sales Rep. v. Prudential Sec., Inc., 925 F.Supp. 1551, 1558 (N.D. Ga. 1996) (Hunt, J.) ("Whether one is a fiduciary is a mixed question of law and fact that can only be made after more factual development than has been had in this case."). Under the notice pleading standards of Fed. R. Civ. P. 8, Plaintiff is not required to allege each and every factual scenario in which the mutual funds may be deemed parties in interest here. Rather, Plaintiff is only required to put Defendant on notice of his claims. Doe v. Smith, 429 F.3d 706, 708 (7th Cir. 2005) ("Plaintiffs need not plead facts; they need not plead law; they plead claims for relief. Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of"). As 29 C.F.R. § 2509.75-3 makes clear, there are numerous ways in which a mutual

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[6] *See also* 29 C.F.R. § 2509.75.2 (noting that there are situations in which transactions with mutual funds can constitute prohibited transactions under ERISA § 406, *e.g.*, where the plan invests in an investment company and "as part of the arrangement it is expected that the investment company will purchase securities from a party in interest...").

fund can become a party in interest other than the plan's investment in the securities of the mutual fund. Plaintiff should be allowed, through the conduct of discovery, to develop facts in support of his claims.[7]

Further, Congress adopted ERISA § 3(21)(B) to prevent investors from suing mutual funds under ERISA for poor investment decisions, because the securities laws already require mutual funds to disclose their investment policies in their prospectuses and further impose fiduciary duties on mutual funds with respect to their handling of shareholder assets. *See* ERISA Legis. History 19-A, Arnold & Porter Legislative History: P.L. 93-406, A&P Hearings H.R. 2, *784, et seq. Plaintiff's claim, again, is not premised upon the Plan's investment in the securities of these investment companies, but rather on the payment of unreasonable and excessive fees. In order to be entitled to an exemption under ERISA, the compensation paid to the party in interest must be "reasonable." *See* ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2). Plaintiff claims that Defendant has caused the Plan to pay the mutual funds (or their sponsor companies) fees for unnecessary, superfluous and sometimes duplicative services that are unrelated to the investment of plan assets and that such fees are accordingly excessive and unreasonable. *See* Compl., ¶¶12-17. Again, these allegations must be taken as true for purposes of a motion for judgment on the pleadings, Hall, 188 F.Supp.2d at 1016, and these allegations have nothing to do with the mutual funds' investment decisions.

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[7] The Court should be aware that Plaintiff attempted to develop facts in support of his Complaint prior to filing by specifically asking Defendant why the Plan failed to purchase institutional shares or some cheaper alternative, but Defendant avoided answering the question. *See* letter of May 20, 2005, from Joseph G. Porter of A.G. Edwards & Sons, Inc. to Plaintiff, attached as Exhibit 1.

In the event the Court is inclined to hold that the exception of ERISA § 3(21)(B) applies to the Complaint as currently drafted, Plaintiff respectfully asks for leave to amend his Complaint to restate the ERISA § 406 claims.

IV. Conclusion

For the reasons stated, Defendant's Motion for Judgment on the Pleadings should be denied in its entirety.

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CERTIFICATE OF SERVICE

______I hereby certify that a copy of the foregoing was transmitted for filing through the ECF filing system on this 6th day of January, 2006, to the following:

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